STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2011
v	No. 296491 Oakland Circuit Court
RICHARD EARL CAVILL, Defendant-Appellant.	LC No. 2007-218161-FH

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was convicted of sexually touching a six-year-old girl at a school where he taught as a substitute teacher in 2000. The trial court sentenced defendant to concurrent prison terms of 19 months to 15 years for each conviction. Because sufficient evidence supported defendant's convictions; the two convictions did not violate double jeopardy protections; and the trial court did not abuse its discretion by denying defendant's motion for an adjournment, admitting MCL 768.27a evidence, or scoring 15 points for OV 10, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence established only a single episode of inappropriate touching and, therefore, was insufficient to support two separate convictions for second-degree CSC. Defendant further asserts that because the evidence established only a single episode of sexual touching, his dual convictions violate constitutional double jeopardy protections. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the charged crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). A double jeopardy question is reviewed de novo as a question of law. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The Double Jeopardy Clause protects a defendant from enduring more punishment than was intended by the Legislature. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). There is no double jeopardy violation when one crime is completed before another crime takes place. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002).

Defendant's reliance on *People v Armstrong*, 100 Mich App 423, 428; 298 NW2d 752 (1980), is misplaced. In that case, this Court held that a sexual penetration accompanied by more than one of the aggravating circumstances enumerated in the statute may give rise to only one conviction. Conversely, in *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986), this Court held that "the Legislature intended to punish separately each criminal sexual penetration." Therefore, the defendant in *Dowdy* was properly convicted of five counts of first-degree CSC for five separate acts of penetration committed during a continuous criminal assault. *Id*. Further, because each penetration did not constitute the "same offense," the multiple convictions did not violate double jeopardy principles. *Id*.

Second-degree CSC is distinguished from first-degree CSC in that the former involves sexual contact, whereas the latter involves penetration. Applying the rationale in *Dowdy* by analogy to this case, it follows that sexual contact is the unit of prosecution for second-degree CSC, and that the Legislature intended to punish each act of sexual contact separately, even if multiple acts are committed during a continuous assault. MCL 750.520a(q) defines "sexual contact" as "the intentional touching of the victim's or actor's intimate parts[1] *or* the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification," or another listed purpose. Thus, both an intentional touching of a victim's intimate parts, and an intentional touching of a victim's clothing covering the victim's intimate parts can qualify as an act of sexual contact.

In this case, the victim testified that defendant touched her vaginal area over her underwear. She further testified that defendant then moved her underwear aside and touched her vaginal area underneath her underwear. This testimony, viewed in a light most favorable to the prosecution, was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant committed two separate acts of sexual contact, one by touching the victim's private parts over her clothing and another by touching her private parts directly. Thus, the evidence supports two convictions for second-degree CSC. Further, because each act of sexual contact is a separate offense, defendant has not established a double jeopardy violation.

II. ADJOURNMENT

Defendant next argues that the trial court erred in denying his motion for an adjournment on the last day of trial. A trial court's denial of a motion for an adjournment is reviewed for an abuse of discretion. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In deciding whether to grant an adjournment, the trial court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *Williams*, 386 Mich at 578; *Lawton*, 196 Mich App at 348. To obtain appellate relief, the defendant must also show that he was prejudiced by the trial court's denial of his request for an adjournment. *Id*.

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[1] MCL 750.520a(e) defines "intimate parts" as including the "primary genital area."

The United States Constitution guarantees a defendant "a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006). Additionally, "[t]he Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense."[2] *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). Thus, in seeking a continuance, defendant was attempting to assert constitutional rights.

In this case, defendant moved for an adjournment for the purpose of locating and calling Elena Gustafson[3] to impeach the testimony of her daughter, J.G., who was defendant's great-niece and was 11 years old at the time of trial. J.G. testified that when she was four or five years old, she visited defendant and his wife. She testified that she sat on defendant's lap and he touched her in the area where she uses the bathroom, under her clothes. This constituted testimony of defendant's other sexual acts under MCL 768.27a. According to counsel for defendant, Gustafson would testify that J.G. had previously made sexual abuse allegations against her biological father, her stepfather, and her foster father thereby impeaching J.G.'s testimony that she had not accused other men of sexual abuse in the past.

Defendant had a legitimate basis for asserting the right to present a defense, i.e., to impeach J.G. Defendant knew that Gustafson was on the prosecutor's witness list as witness who "might be called at trial." Defendant could have subpoenaed her, but he did not. Under MCL 767.40a(5), defendant could have requested the prosecutor's assistance to locate her and serve her, but he did not. In fact, the record shows that Gustafson was present in the courtroom during at least a portion of the trial but defense counsel did not ask that she be made available.

Further, defendant failed to submit any evidence of prejudice, such as an affidavit supporting his claim that Gustafson would testify as he expected. In any event, the sought testimony would not have pertained to the charged offenses. And, it appears that the testimony would not be particularly helpful to defendant unless the witness testified that J.G.'s prior accusations were *false*, which would not be within the witness's personal knowledge. Additionally, one of defendant's own witnesses testified that Gustafson herself had previously made allegations that defendant had sexually abused her when she was young. The record also shows that defendant had requested and received two prior adjournments, one for unspecified reasons granted on July 16, 2008 and the other pending a Supreme Court decision granted on August 15, 2008. And there were two subsequent stipulated adjournments related to prosecutor witness availability, not attributable to defendant granted on May 19, 2009 and July 24, 2009. On this record, defendant has not shown that he was prejudiced by the trial court's denial of his motion for an adjournment to enable him to call this witness on the last day of trial.

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[2] However, "[a] criminal defendant's right to compulsory process, though fundamental, is not absolute." *McFall*, 224 Mich App at 408. "[I]t requires a showing that the witness' testimony would be both material and favorable to the defense." *Id*.

[3] Gustafson is defendant's wife's cousin.

III. MCL 768.27a

Defendant next argues that the trial court erred in admitting evidence of his other sexual acts against children under MCL 768.27a. A trial court's decision to admit evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Here, however, defendant does not argue that the challenged evidence did not qualify for admission under MCL 768.27a. Rather, he argues that the statute violates the separation of powers doctrine because it amounts to legislative intrusion into the Supreme Court's exclusive authority to establish rules of practice and procedure. Questions of law concerning the admissibility of evidence are reviewed de novo, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), as are constitutional issues. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

This Court has previously considered and rejected defendant's argument. In *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007), this Court held that "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts." See also *People v Wilcox*, 280 Mich App 53, 54-55; 761 NW2d 466 (2008), rev'd on other grounds 486 Mich 60 (2010). Because MCL 768.27a is substantive in nature, it does not violate separation of powers principles. Further, because defendant does not dispute that the challenged evidence otherwise qualified for admission under MCL 768.27a, it is unnecessary to consider defendant's additional claim that MRE 404(b) would not have provided an independent basis for admitting the evidence.

Defendant further argues, however, that even if the evidence is admissible under MCL 768.27a, it should have been excluded under MRE 403. Evidence that is admissible under MCL 768.27a is still subject to exclusion under MRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice[.]" *Pattison*, 276 Mich App at 620-621. Evidence was presented that defendant was a teacher, a religious person, had a good reputation, and was active in church-sponsored social programs. Further, the victim delayed reporting the crime for seven years. Under these circumstances, the probative value of the other acts testimony was "extraordinarily pertinent" to the jury's assessment of the victim's credibility. See *Id*. at 620-621. Even if the evidence was somewhat prejudicial, the trial court did not abuse its discretion in ruling that its probative value was not substantially outweighed by the danger of unfair prejudice.

IV. SENTENCING

Defendant lastly argues that the trial court erred in scoring offense variables 4 and 10 of the sentencing guidelines. Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). When scoring the guidelines, "[a] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the evidence did not support a score of 15 points for OV 10. Fifteen points are to be scored for OV 10 where "[p]redatory conduct was involved." MCL

777.40(1)(a). "Predatory conduct" is defined as "pre-offense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The evidence showed that defendant was the victim's substitute teacher. The victim testified that defendant singled her out, called her up to his desk while the other children were occupied, motioned for her to sit on his lap, put his arm around her, and then turned his chair into the desk in an effort to restrict her movement before engaging in sexual contact. This evidence supports an inference that defendant engaged in pre-offense conduct to gain access to the victim, so that he could restrain, and then molest her. Thus, the evidence supports the trial court's 15-point score for OV 10.

Defendant finally argues that the trial court's scoring of OV 4[4] and OV 10 violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because it was based on facts not found by a jury beyond a reasonable doubt. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. As defendant here concedes, our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. See *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

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[4] The trial court's scoring of OV 4, MCL 777.34 (psychological injury to victim) at 10 points was supported by a preponderance of the evidence. Both the victim and her mother testified that the victim experienced emotional and psychological manifestations as a result of the trauma. The victim was having nightmares, trouble sleeping, and felt burdened. The victim's mother confirmed that, at the time of trial, the victim was still waking up crying and was in counseling.